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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 325

JAMES A. WATTS AND WALTER B. BLUE, *Petitioners*,

v.

SEWARD SCHOOL BOARD AND BOARD OF EDUCATION, APPEAL HEARING COMMITTEE, *Respondents*.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALASKA

OPINIONS BELOW

The original opinion of the Supreme Court of Alaska is reported at 395 P. 2d 372 and reprinted at App. pp. 34-40.[1] The opinion of the Supreme Court of Alaska on remand from this Court is reported at 421 P. 2d 586, and reprinted at App. pp. 47-119. The opinion denying

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[1] "App." refers to the Joint Appendix filed by the parties in this Court; "R." refers to cited portions of the record which were not printed.

a petition for rehearing is reported at 423 P. 2d 678 and reprinted at App. pp. 122-125.

JURISDICTION

The judgment of the Supreme Court of Alaska was entered on December 7, 1966, and a timely petition for rehearing was denied February 2, 1967. On May 8, 1967, Mr. Justice Douglas filed an order extending the time for filing this petition to July 3, 1967. The petition for Certiorari was granted on October 9, 1967. This Court has jurisdiction under 28 U.S.C. § 1257 (3).

QUESTIONS PRESENTED

1. May public school teachers be discharged for the exercise of their First Amendment rights of association and criticism of public officials?

2. Is AS 14.20.170, which authorized the discharge of school teachers for "immorality", and was construed by the Alaska Supreme Court to be a "catch-all" extending to "social misbehavior" and to include the exercise of First Amendment rights, unconstitutionally vague and overbroad?

3. Did the Supreme Court of Alaska deny petitioners their rights under the First and Fourteenth Amendments by relying on School Board Regulation E(7) to sustain their discharge?

CONSTITUTION, STATUTE AND REGULATIONS INVOLVED

This case involves the First and Fourteenth Amendments to the United States Constitution, AS 14.20.170 prior to amendment by S.L.A. 1966 chapter 104, and Seward School Board Regulations E(7) and E(9). They are reprinted in Appendix C, *infra*.

STATEMENT OF THE CASE

INTRODUCTION

In March 1960, petitioner James A. Watts had taught in the public schools in Seward, Alaska, for eight years; petitioner Walter B. Blue had taught there for fifteen years. They then received from respondent Seward School Board notices of nonretention (i.e., discharge), stating the grounds therefor as required by the state teacher tenure law (App. C, *infra*). Both petitioners were charged with circulating to the public an Open Letter to the School Board, which was critical of the Board and the School Superintendent; and with subsequently circulating a petition for an election to recall the members of the School Board. Watts was charged also with soliciting teachers to join a group whose purpose was to oust the school superintendent; Blue was charged also with making a speech to the Longshoremen's Union in an attempt to obtain support for the recall election. The School Board ultimately found against petitioners on each of the grounds stated, but these determinations were in part reversed by the state courts, as a result of proceedings detailed below. As the case comes here, the discharge of both petitioners has been sustained because they circulated the Open Letter, and Watts' discharge has been sustained for the additional ground that he asked two members of the faculty "if they would go along with a group of which Watts was a representative and whose purpose was to oust * * * the superintendent of schools."[2] It is petitioners' contention that their dis-

[2] Petitioner Watts denied that this was the substance of the conversation. See pp. 6-7, *infra*. Because we believe that Watts' discharge is unconstitutional even if respondents' view of the facts is accepted, we shall not develop at length our objection to this finding, although we preserve it for the Court's consideration in the event it is deemed to affect the constitutional result. See, e.g., *New York Times* v. *Sullivan*, 376 U.S. 254, 285; *Napue* v. *Illinois*, 360 U.S. 264, 272; *Niemotko* v. *Maryland*, 340 U.S. 268, 272.

charge on these grounds violates their rights under the First and Fourteenth Amendments. Petitioners urge additionally that the statute and school board regulation which were the basis for their discharge are, as construed below, unconstitutionally vague and overbroad.

A. The Circumstances Leading to Petitioners' Discharge.

This case arises out of a controversy in the Seward, Alaska school system which began in the fall of 1958. Soon after the school term began, a teacher, Mr. Conder, was provoked into resigning when George Fabricius, the new School Superintendent, forbade him from riding the school bus to work. (App. pp. 393-396). As a result of Conder's loss of his job, repeated statements by the Superintendent that he would have to get rid of many of the teachers (App. pp. 354-355, 372, 393, 500-501; R. pp. 64, 236), and numerous other incidents which were perhaps minor in themselves (see e.g., App. pp. 237-239, 369-373, 439-448, 488-489; R. 59-60, 236-237), there grew up among the faculty considerable tension and fear that their jobs and homes in Seward were in jeopardy.[3]

In March four teachers (not the present petitioners) received notices of nonretention. The Grievance Committee of the Seward District Teachers Association (SDTA) sent a letter simultaneously to the Superintendent and the School Board asserting that these discharges were illegal and requesting a meeting with the Board to discuss them. Such a meeting was held on March 31, and the School Board, though admitting

[3] As it turned out, of the eighteen teachers in the Seward school system who owned homes at the beginning of the 1958 school year, only five were still teachers in November 1960. (App. p. 446).

that they had not complied with the law, objected that the Association was trying to hold the Board up with a technicality, and refused to reconsider its decision. The SDTA then communicated with its parent organization in Washington, the National Education Association (NEA). The NEA confirmed the view that the School Board's action was illegal and urged that the case of the four teachers be vigorously pursued. On this basis the executive board of the SDTA wrote another letter to the respondent school board urging that the four teachers' contracts be renewed according to law. The School Board did not respond, nor did it renew the contracts. (App. pp. 226-228, 385-386.)[4]

A meeting was scheduled by the SDTA of all its membership for the evening of April 28, to discuss what further steps, if any, should be taken with regard

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[4] Mr. Walton: I see. And what transpired at that meeting?

Mr. Watts: We discussed the non-retention of the teachers who had made their appeal for their contracts, the School Board stated that they did not want these teachers and they were not willing to return their contracts.

Mr. Walton: Do you recall anything in particular which any of the board members or Mr. Fabricius said on that occasion?

Mr. Watts: Yes—I remember that Mrs. Whitmore said words to this effect, that if the School Board was forced to give these contracts to these teachers that it would be very easy to fire them at a later date. It was very simple to overstaff then in the fall dismiss the extra teachers which would be the teachers they wanted to fire. At that time Mr. Fabricius stated, said Yes it's very easy to dismiss any undesirable teacher we have on our staff and all we have to do is to check if a teacher is a minute late in the mornings, fails to get a report in exactly on time or is out of the room without permission, it constitutes substantial non-compliance with the regulations.

Mr. Walton: When Mrs. Whitmore so spoke, did she appear to have the concurrence of the other Board members present?

Mr. Watts: I heard no disagreement. (App. pp. 227-228.)

to the contracts of the four teachers. That morning a conversation took place between petitioner Watts and Mr. and Mrs. Benjamin Frampton, the principal and a teacher in the elementary school, which is one of the grounds assigned for Watts' discharge. Watts testified that on the previous evening the executive committee of the SDTA had asked him to speak to the Framptons (whom he had known for many years) to get their support for the meeting that night to continue the efforts to get the contracts back for the teachers. According to petitioner, Mrs. Frampton stated that she and her husband were in strong agreement with the Superintendent's policies and that they would not go along with Watts; Mr. Frampton concurred with her. (App. pp. 203-204.)

However, the Framptons testified otherwise. Mr. Frampton said:

> I went with Mr. Watts down to Mrs. Frampton's room and there he stated that he had been sent as representative of the group, and because he had been a friend of ours for a long time. He wanted to know if we would go along with a movement to oust Mr. Fabricius. He stated that we knew the certification of teachers is not the real issue. He said that he knew I was in the middle and didn't want me to get hurt. He said that they were quite sure they could get Mr. Fabricius and wanted to know if we would go along with them. We told him at that time that we could see no reason why anyone should try to get Mr. Fabricius and we considered he was doing all right and would have to take a stand [with] Mr. Fabricius and the school board. Then we asked Mr. Watts what group was going along with him. Then he said under the circumstances he would rather not say. I believe that ended the conversation. (App. p. 147.)

This was confirmed by Mrs. Frampton. Watts denied that he had solicited the Framptons for the purpose of joining a group to oust the Superintendent.[5]

The School Board accepted the Frampton's version, and the court below ultimately affirmed this finding on the ground that it was supported by substantial evidence. (App. p. 68.)[6] There was no evidence and no finding that Watts ever communicated the substance of this conversation to any other persons.

The SDTA meeting was held that evening as scheduled. The membership voted 12-11 against taking any further action in support of the four teachers who had been illegally non-retained. Within three or four days efforts were started to affiliate with the American Federation of Teachers (AFL-CIO) and eighteen members of the SDTA joined the AFT. (App. pp. 233-234.) At the meeting of the School Board, which was attended by many citizens of Seward, the AFT was represented by an attorney, who spoke at length, and succeeded in having the Board reverse its prior decision, and renew the contracts of the four non-retained teachers. At the close of the meeting, counsel for the AFT asked the Board to meet with the AFT in order that the other grievances which had arisen between the teachers and the administration could be discussed privately. This

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[5] Mr. Walton: Would there have been any reason at that time for you to say such words as they have repeated to you, such as "we are going to get the Superintendent" or words to that effect?
Mr. Watts: There would have been absolutely no reason to because all we were concerned about at this time was getting the teachers' contracts. (App. p. 231).

[6] The School Board also found that Watts made similar overtures to a teacher named Richardson, but as there was absolutely no evidence to support such a finding, the court below did not rely on it in affirming Watts' discharge. (App. p. 68, n. 24).

request was ignored. (App. pp. 437-439). Shortly thereafter two other teachers lost their jobs. A Mr. Smith was demoted and Mr. Swick, one of the leaders in the AFT group,[7] was advised that his position had been declared vacant. (App. pp. 262, 437).

The AFT's counsel again attempted unsuccessfully to arrange a meeting with the School Board. Then Mr. Blue communicated with Mr. Howell, then the President of the School Board, who agreed to a meeting between the teachers and the Board on May 16th. When the time came, however, only Mr. Howell appeared, and explained that the Board had decided not to meet until they had an attorney. (App. pp. 197-198, 400-401.) As a direct result of the failure of that meeting, the AFT voted to distribute an Open Letter to the Public to inform it of the difficulties which had arisen and to obtain an immediate public meeting with the School Board. Its full text is reprinted as Appendix A to this Brief. For their part in its preparation and circulation, petitioners were discharged from their positions as public school teachers.

In a letter addressed to the President of the AFT, the President of the School Board scheduled a meeting for May 26, which was subsequently held on May 28. There were present members of the School Board, Superintendent Fabricius and Mr. Watts, as Secretary of the AFT.

The AFT considered the meeting to be a failure because, in Watts' words,

> ... after almost two hours of tape recording of this meeting at the very end and when it was quite

[7] During his testimony Fabricius referred to Blue, Watts and Swick as the "troublesome trio". (App. p. 293).

> obvious that we were not going to make any headway, just about the time the tape ran out, Mr. McRae said to me, he said, Jimmy you and all the rest of your trouble makers ought to resign and get out so we can organize a good school. Then, someone noticed that the tape recorder had evidently run out of tape and there was a little discussion over that and I was waiting to be dismissed and Mr. Fabricius stated "Watts you and all the rest of your union members ought to have your throats cut." (App. p. 246)

Watts then reported back to the executive committee of the AFT, and the next day the AFT started a petition for an election to recall the School Board. (App. p. 246.) A sufficient number of names was obtained but the City Council failed to direct an election. Petitioner Blue brought suit to require that the election be held and prevailed in the Supreme Court of Alaska. *Blue* v. *Stockton,* 355 P. 2d 395. In the course of the campaign Blue made a speech to the Longshoremen which was subsequently the basis of charges against him. (See App. p. 68). Two members of the School Board also participated actively. The election was held on October 4, 1960. With approximately 600 citizens voting, 60% of the vote was in favor of the School Board and the recall movement was defeated.

When petitioner Blue was asked why he participated in the actions which resulted in his removal, he testified as follows:

> In my function as a teacher of Social Studies, I have the responsibility of teaching such things as freedom of speech, freedom of in general, the American tradition of democracy. As a matter of fact, in becoming involved in the whole teacher's controversy, this underlay the entire motivation for my involving myself at all. If I am to teach

these things to students, I believe it is my obligation to practice what I preach, if I possibly can. Ordinarily I have not become involved in controversies, but when I saw the four non-retained teachers abandoned, without respect to their rights, as I understood it, this was back in the Seward District Teachers Association, I had to make a decision about moral responsibility. Should I shrug my shoulders, laugh it off, well it didn't affect me personally. Or did I have an obligation to do what I thought was necessary to help protect fellow members of the profession. So I had to make a decision, like it or not. The reason I made this decision was not to please myself, because I don't enjoy controversies. I have not enjoyed this controversy. But how can I teach these values to my students, assuming that I am able to do so, if I refuse to shoulder the responsibility or if my fellow teachers, or my fellow union members refuse to shoulder such responsibility when it is thrust upon us. I believe that young people when they see a teacher whom they often may tend to set up as a pattern, suddenly not acting according to the way they think you should go, then you lose your teaching effectiveness, and as a result, you can't do the job best that you're supposed to do. So I felt that I owed this to the teaching profession generally. I thought that we as AFT members, and SDTA members owed this to the teaching profession generally, to try to correct the things that were going on in our school which we did not think were in the democratic tradition. (App. 456-457.)

B. The Proceedings on Petitioners' Nonretention.

1. The Proceedings within the Alaska School System.

As stated at the outset, petitioners were served with notices of nonretention in March, 1960. Petitioners were entitled to and received a hearing before the School Board on April 8, 1960. Four days later the School Board issued its decision without findings,

affirming its decision to discharge petitioners. Petitioners then appealed to respondent State Board of Education, as authorized by law. On July 1, 1960, the Appeals Hearing Committee of the State Board, after holding an oral hearing at which counsel appeared, reversed the School Board and remanded the proceeding for a new hearing because the School Board had failed to make findings of fact or state its conclusions.

Thereupon the School Board held four days of hearings,[8] from November 4 to November 12, 1960. It entered its decision on March 1, 1961, reaffirming petitioners' discharge. The findings and conclusions of the School Board which relate to the charges which remain in the case are set forth in Appendix B to this Brief. To summarize, the School Board concluded as follows: 1) both teachers had engaged in immoral conduct under the tenure statute by circulating the Open Letter; 2) both teachers had engaged in immoral conduct by circulating the recall petition; 3) Blue had engaged in immoral conduct by his speech to the union; 4) Watts had engaged in immoral conduct by his conversations with the Framptons and Richardson, in which the Board found he had solicited them to join with him and others in an effort to oust the Superintendent; 5) both teachers had violated School Board regulation E-7 by circulating the Open Letter, because they had not brought it to the attention first of the Superintendent and then of the School Board before making it public.

Petitioners appealed again to the State Board of Education. The Board affirmed the School Board's action, stating, "Since after mature consideration of

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[8] References to the record in this Brief are to the transcript of that hearing, which consists of two volumes in the certified record.

these records and arguments we do not feel that the original decision of the School Board was unsupported by substantial evidence, we are constrained to agree with the Board's decision." (App. p. 9.)

2. The First Petition for Review.

Petitioners then filed a petition for writ of review in the State Superior Court, Third Judicial District, under Rule 111 of the Alaska Rules of Civil Procedure, praying that the decision of the State Board of Education be held for naught and the teachers reinstated, or a new hearing directed. (App. pp. 1-13.) In a "Mandate" which issued on December 28, 1961, Judge James M. Fitzgerald granted review, and vacated the decision of the State Board. (App. pp. 15-19.) He ruled as a matter of law that neither circulation of the Open Letter, nor circulation of the recall petition were "immoral" conduct under the tenure statute. The Judge ruled further that because the State Board had not entered findings, he could not determine: 1) whether the Board had rested its decision in part on the premise that these activities constituted immoral conduct; 2) whether the State Board had rested its decision in part on the School Board's conclusion that there had been substantial noncompliance with Rule E-7; and 3) which of the School Board's findings were deemed by the State Board to have been supported by substantial evidence. He therefore remanded the case to the State Board of Education, Appeal Committee with directions "to make specific findings of fact and enter concrete conclusions," and authorized the State Board to augment the record if it so chose.

3. The Further State Board Proceedings.

The State Board of Education did not render its decision on remand until July 31, 1962.[9] (App. pp. 20-26.) It stated that School Board Findings 19-22 and 26-28 (Appendix B, *infra*), were supported by substantial evidence. It held that Watts was guilty of "immoral" conduct within the meaning of the tenure statute "when he engaged in conferences with the Framptons and Richardson urging them to join in the circulation of an Open Letter and the conduct of a recall election against the School Board of Seward." (App. p. 21)[10] It held that petitioner Blue was guilty of "immoral" conduct when he made his speech to the Longshoremen's Union. The State Board also held that both petitioners were guilty of substantial non-compliance with School Board Regulation E-7 by circulating the Open Letter. Although counsel for the School Board conceded that it did not have any minutes reflecting the adoption of Regulation E-7 by the School Board, the State Board held, solely on the basis of an affidavit by the School Board's members (Ex. 13), that it was adopted and put into effect "at least prior to January 1, 1959."

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[9] Because of this delay, the Superior Court issued an Order Requiring the State Board to report to the Court (Jan. 31, 1962), which was not complied with, and an Order to Show Cause why petitioners should not be reinstated (July 3, 1962). The State Board's decision was rendered two weeks before the return date directed by that Order.

[10] This finding differed from that of the School Board, which had not found that either the Open Letter or the recall petition was discussed in these conversations. It is undisputed that neither the Open Letter nor the recall petition was even contemplated by the AFT group at the time of Watts' April 28 conversation with the Framptons.

4. The First Decision of the Supreme Court of Alaska.

Petitioners filed a second petition for writ of review in Superior Court. This petition was denied on September 13, 1963, without opinion or findings by Judge Hubert A. Gilbert. (App. p. 32.) Petitioners then appealed to the Supreme Court of Alaska. On September 21, 1964, the Supreme Court unanimously affirmed the judgment of the Superior Court. (*Watts* v. *Seward School Board,* 395 P. 2d 372; App. pp. 34-40.) The Court held that petitioners were guilty of "immoral" conduct: Watts by his conversations with other teachers, and Blue by his speech to the Longshoremen's Union. The Court found it unnecessary to decide whether circulation of the Open Letter constituted noncompliance with Regulation E-7. The Court also declined to consider petitioners' contention that their discharge was unconstitutional. (App. pp. 39-40.)

5. The First Decision of this Court.

Petitioners then filed a Petition for a Writ of Certiorari in this Court, urging that petitioners' discharge violated their rights under the First Amendment. On May 3, 1965, this Court granted certiorari, vacated the judgment of the Alaska Supreme Court and remanded the case for reconsideration in light of changes in Alaska laws pertaining to teachers which had been enacted while the Petition was pending. (*Watts* v. *Seward School Board,* 381 U.S. 126; App. pp. 42-43.)

6. The Second Decision of the Supreme Court of Alaska.

On remand, further briefs were filed by the parties, and oral argument was held in October, 1965. While the case was under advisement, the Court directed that the record be supplemented by the transcripts of the various proceedings within the school system and the

exhibits received at those hearings (see App. p. 51). On December 7, 1965, the Court below reaffirmed its original decision by a 2-1 vote.

The Court construed the "immorality" provision of the tenure statute to be a "catch-all" (App. pp. 52, 53, 79), proscribing "any and all conduct of the teacher which tends to bring disgrace or disrespect upon the teacher or the teaching profession. This definition would include all conduct from the commission of the most heinous felony down the scale of infamy to social misbehavior." (App. p. 53)[11] The Court found that Blue's speech to the Longshoremen and Watts' conversation with the Framptons fitted into this definition. (App. pp. 67-71.) The Court also ruled—although no party had argued—that circulation of the Open Letter was "immoral" conduct within the meaning of the statute. (App. pp. 65-66)[12] In this connection the Court approved as "supported by substantial evidence" the finding of the School Board that some of the statements in the Open Letter were "false," and commented also that the proposals contained therein were "high-handed." (App. p. 66) The Court held that distribution of the Open Letter was a ground for nonretention of petitioners for the additional ground that it violated School Board Regulation E-7.

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[11] The Court held that the amendment of that definition by the Legislature, and the other intervening changes in state law, would not be applied retroactively to this case. (App. pp. 75-83).

[12] There had been no indication in the first opinion of the Alaska Supreme Court that it still considered that issue, which had been decided against respondents by Judge Fitzgerald in the first review proceeding, to have remained in the case. The dissenting Justice in the Supreme Court protested strongly against the reopening of this issue. (App. pp. 92-98.)

Turning its attention to the constitutional issues, the Court held that petitioners' discharge for circulating the Open Letter, and Watts' discharge for his conversation with the Framptons were not prohibited by the First and Fourteenth Amendments. The Court said that petitioners had a constitutional right to engage in these activities, but that they had no constitutional right to have their contracts renewed after they had done so. (App. pp. 84-86.) But with respect to Blue's speech, which it also had held to be grounds for discharge under the "immorality" provision, the Court said that "the constitutional question becomes a close one," which it resolved in Blue's favor. (App. pp. 86-87.)

The Court thus sustained both petitioners' discharge for circulating the Open Letter, both because it was "immoral" conduct, and because it violated Regulation E-7. It sustained Watts' discharge on the additional ground that his solicitation of the Framptons was "immoral" conduct.

Mr. Justice Rabinowitz filed an opinion concurring in the reversal of the charge based on Blue's speech, but dissenting from the remainder of the Court's judgment and opinion. (App. pp. 92-119.) While respectfully inviting attention to his entire opinion because of the light it sheds on that of the majority, and particularly to his discussion of the free speech issue, we shall confine our quotation to his conclusion:

> One of the most important functions of this court is to assure that constitutional rights are vindicated. By today's decision the right to free speech in this state has sustained a serious encroachment. Apparently the principle that free speech encompasses "uninhibited," "robust," and "wide-open"

debate on public issues has been shunted aside. In its place has been substituted a holding that cannot fail to curtail discussion among those most intimately concerned with this state's educational system. (App. p. 119.)

A timely petition for rehearing was denied.

SUMMARY OF ARGUMENT

I.

The Open Letter which Petitioners circulated to the public, which was critical of the School Board and the School Superintendent, was protected by the First and Fourteenth Amendments under the principle that "debate on public issues should be uninhibited, robust, and wide-open," *New York Times* v. *Sullivan*, 376 U.S. 254, 270. Petitioner Watts' alleged request to two teachers that they join a group in an effort to oust the School Superintendent was likewise protected, for "it is now beyond dispute that freedom of association for the purpose of advancing ideas and airing grievances is protected by the Due Process Clause of the Fourteenth Amendment from invasion by the States." *Bates* v. *Little Rock*, 361 U.S. 516, 523. Plainly, association for political activity, including a campaign to oust a public official by peaceful means, is of the essence of that freedom as well as the logical consequence, in a democratic society, of the right to criticize public officials. Indeed, invitations to associate for this purpose must be deemed to be protected; for if they were not, this constitutional right would be cut off at the threshold.

The Court below agreed that petitioners were engaged in constitutionally protected activity, but held that they could nevertheless be discharged from their positions as teachers because of it. In this that Court

erred. The discharge of a public employee for exercising his First Amendment rights is at least as likely to induce "self-censorship" as the civil and criminal remedies for libel of public officials which were sharply circumscribed in *New York Times, supra,* and *Garrison* v. *Louisiana,* 379 U.S. 64. To view the issue simply as one which relates to the contractual relationship between the public employee and his employer, the government, is to miss the central meaning of the First Amendment—that free and full debate on public issues benefits not only the speaker, but the entire society. Moreover, the "contract" theory of the Court below is but a variant of the doctrine, now thoroughly discredited, that a public employee can be required to sacrifice either his job or his constitutional liberties.

The immorality provision, broadly construed by the Supreme Court of Alaska, plainly does not qualify as legislation "narrowly drawn to define and punish specific conduct as constituting a clear and present danger of interest to the State." *Cantwell* v. *Connecticut,* 310 U.S. 296, 311. Nor do any of the grounds stated for bringing this case under the "immorality" statute present the compelling state interest which alone would justify the encroachment on petitioners' liberty of free association. See *Bates* v. *Little Rock, supra.*

While the Court below found some of the statements in the Open Letter to be false (which petitioners deny), the record clearly shows that petitioners believed that the statements were true and that they did not act recklessly. *New York Times* and the cases following it squarely hold that truth cannot be the test of whether criticism of government officials is constitutionally protected. Nor can circulation of the Open Letter or Watts' solicitation of the Framptons justify

their discharge on the theory that it brought either them or the teaching profession into disrespect. To hold that a teacher brings disrespect upon himself by criticizing the administration of the schools, overlooks the obligation of the citizen to engage in political activity; the latter contention smacks of the "libel on government" which was expressly disapproved in *New York Times*. Nor can the view of the Court below that the Open Letter was "high-handed" justify its decision; the First Amendment does not make courts, any more than other organs of government, the ultimate arbiters of political discussion.

Respondents' position is not furthered by their contention that petitioners violated a School Board regulation which required them before publishing the Open Letter to present their criticisms to the School Superintendent and then to the School Board. It is utterly incompatible with a Constitution whereunder, as Madison said, "the censorial power is in the people over the Government, and not in the Government over the people", to permit public officials to shield their stewardship from criticism by imposing on their subordinates vows of silence to be observed on pain of discharge. For they then displace "the power of reason as applied through public discussion" with "silence coerced by law—the argument of force in its worst form," Brandeis, J., concurring in *Whitney* v. *California*, 274 U.S. 357, 376.

It is argued here that petitioners' discharge was required to maintain the "morale and discipline" of the school system. While cases may arise in which these considerations would justify the infringement of First Amendment rights of public employees, this is not one of them. We submit that the appropriate test is

whether the conduct sought to be punished constitutes "a substantive evil actually designed to impede" the performance of the School Board's functions. This is the standard which has been applied in reviewing convictions for contempt of court where an exercise of First Amendment rights was claimed to impede the administration of justice, *e.g. Wood* v. *Georgia,* 370 U.S. 375, 389. There is at least as great an interest in the unobstructed administration of justice, as there is in the efficiency of the public service; similarly, even as "the administration of the law is not the problem of the judge or prosecuting attorney alone, but necessitates the cooperation of an enlightened public," *id.* at 391, administration of the other branches of government is not the exclusive domain of the administrators. *Wood* v. *Georgia* teaches also that this Court will examine for itself whether the facts of the individual case require the subordination of First Amendment rights to the interests of administration. The record here does not show, and indeed the Court below did not find, that petitioners' conduct actually interfered with the operations of the school system. Thus respondents have failed to meet the burden of showing that the rigorous standards of the First Amendment have been met.

This case is a far cry from *United Public Workers* v. *Mitchell,* 330 U.S. 75, which sustained the constitutionality of Section 9(a) of the Hatch Act. That section reaches only partisan political activity, and expressly permits activities of the nature engaged in by the present petitioners. Moreover, in *Mitchell* the Court relied heavily on a Congressional judgment which was based on a conscious regard for the political rights of civil servants. This is in sharp contrast to

the statute and regulation relied on by respondents here, which were not even designed specifically to deal with this subject, and which therefore do not come to this Court "encased in the armor wrought by prior legislative deliberation," *Bridges* v. *California,* 314 U.S. 252, 261; *Wood* v. *Georgia, supra,* 370 U.S. at 385. There is no occasion, therefore, to consider whether *Mitchell* should be followed in a case in which its holding is relevant.

II.

The Court below authoritatively construed "immorality" to be a "catch-all" which includes "all conduct from the commission of the most heinous felony down the scale of infamy to social misbehavior." That construction of the statute is authoritative and binding here, even if a narrower interpretation would have protected it from constitutional challenge. *NAACP* v. *Button,* 371 U.S. 415, 431-432. And under that construction the statute is hopelessly vague and uncertain and denies the affected teachers due process of law. This would be true even if the statute did not touch upon First Amendment rights. "Social misbehavior" is plainly a concept so inherently vague "that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally* v. *General Construction Co.,* 269 U.S. 385, 391. But the statute must be assessed by the "stricter standards of permissible statutory vagueness" applicable to a statute having a potentially inhibiting effect on speech. *Smith* v. *California,* 361 U.S. 147, 151. For it is clear from this case that, as construed by the Court below, it touches upon "the area of free expression." *NAACP* v. *Button,* 371 U.S. 415, 432. What was recently said

in *Keyishian* v. *Board of Regents,* 385 U.S. 589, 603-604 is therefore directly in point and controlling:

> We emphasize once again that "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms," *N.A.A.C.P.* v. *Button,* 371 U.S. 415, 438; [f]or standards of permissible statutory vagueness are strict in the area of free expression. . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *Id.,* at 432-433.

The immorality provision, as construed below, suffers also from unconstitutional overbreadth, i.e., it unnecessarily impinges upon protected First Amendment freedoms. *Shelton* v. *Tucker,* 364 U.S. 479, 488; *United States* v. *Robel,* 389 U.S. 258. That the immorality statute extends its prohibitions to constitutionally protected conduct is clear from the opinion below. It was therein held that Blue's speech to the Longshoremen was "immorality" within the meaning of the statute. The speech was plainly protected by the First Amendment, see e.g., *Stromberg* v. *California,* 283 U.S. 359, 369, as the Court below acknowledged. A statute which has been expressly construed to prohibit conduct protected by the First Amendment may not stand.

Regulation E-7 as construed below is also unconstitutionally vague. On its face it simply states a procedure which teachers must follow in presenting their grievances to the School Board. It makes no reference to political activity, or to any other communications by teachers to the public. It therefore gives no warning to the teacher that he risks discharge if he communicates with the public without previously proceeding through the channels prescribed by the regulation. The regulation fails to give fair notice, also, because it

appears to be inconsistent with another regulation which prescribes a different procedure for communicating with the School Board. The author of these regulations, the School Superintendent, was unable to reconcile them. In these circumstances, the regulation must be held to be unconstitutionally vague, most particularly so under the strict standards applicable because of its impact on First Amendment rights.

The regulation is likewise unconstitutional for overbreadth. It makes no exceptions. It requires *all* teachers to process *all* criticisms of the school administration through the School Superintendent and the School Board before making them public. Compare *Shelton* v. *Tucker*, 364 U.S. at 487-490. And since regulation E-7 applies only to grievances, it inhibits one side of the discussion of school issues while allowing those teachers who would speak favorably of the school administration unlimited access to the public. The First Amendment does not permit such preference for public officials over their critics. See *New York Times* v. *Sullivan*, 376 U.S. at 282.

ARGUMENT

I. THE DISCHARGE OF PETITIONERS FOR POLITICAL ACTIVITY VIOLATED THEIR RIGHTS OF FREE SPEECH AND ASSEMBLY UNDER THE FIRST AND FOURTEENTH AMENDMENTS.

The First and Fourteenth Amendments embody "a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open, and that it may include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials." *New York Times* v. *Sullivan*, 376 U.S. 254, 270.

This Court has reaffirmed that commitment in a variety of contexts, e.g., *Garrison* v. *Louisiana*, 379 U.S.

64; *Bond* v. *Floyd,* 385 U.S. 116; *Time, Inc.* v. *Hill,* 385 U.S. 374; *Keyishian* v. *Board of Regents,* 385 U.S. 589. The right to criticize public officials and government is, as was recognized in *New York Times,* essential to preserve free discussion of public affairs, a basic objective of the First Amendment. Thus, when petitioners circulated the Open Letter, critical of the administration of the school system by the School Board and its superintendent, they were engaging in a fundamental constitutional right. What this Court said recently in *Mills* v. *Alabama,* 384 U.S. 214, fits their case precisely:

> Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes. The Constitution specifically selected the press, which includes not only newspapers, books, and magazines, but also humble leaflets and circulars, see *Lovell* v. *City of Griffin,* 303 U.S. 444, to play an important role in the discussion of public affairs. Thus the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve. Suppression of the right of the press to praise or criticize governmental agents and to clamor and contend for or against change, which is all that this editorial did, muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free. (*Id.* at 218-219.)

The same principle preserved Watts' right to criticize the School Superintendent in his conversation with the Framptons, and in urging them to join with Watts and others "in a move to oust the Superintendent." For "it is now beyond dispute that freedom of association for the purpose of advancing ideas and airing grievances is protected by the Due Process Clause of the Fourteenth Amendment from invasion by the States. *De Jonge* v. *State of Oregon,* 299 U.S. 353, 364, *N.A.A.C.P.* v. *State of Alabama,* 357 U.S. 449, 460," *Bates* v. *Little Rock,* 361 U.S. 516, 523. Plainly, association for political activity, including a campaign to oust a public official by peaceful means, is the essence of that freedom, as well as the logical consequence, in a democratic society, of the right to criticize public officials.[13] If invitations to associate for this purpose were unprotected, the constitutional right could be cut off at the threshold.[14]

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[13] In *De Jonge, supra,* Mr. Chief Justice Hughes held for a unanimous Court, "The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government." 299 U.S. at 365.

[14] The Court below characterized petitioner's "move to oust the Superintendent" as "private" because it lacked the support of the majority of the Alaska Teachers Federation. (See App. p. 70). Even if accurate, this observation is devoid of constitutional relevance. Nothing could be more subversive of the ultimate objective of the right of free association to allow peaceful change, see *De Jonge* v. *Oregon, supra,* than a constitutional rule that only the *majority* may freely engage in political activity.

These principles are by now so well established that we need not elaborate them further, particularly since the court below acknowledged that petitioners were engaged in constitutionally protected activity. It recognized that under *New York Times* and *Garrison* petitioners could not be mulcted for civil damages or imprisoned, but held nonetheless that the same conduct subjected them to nonretention, on the theory that petitioners did not have a constitutional right to have their contracts renewed. (App. pp. 84-86.)

This reasoning ignores the governing consideration of the *Times* and *Garrison* decisions—that civil and criminal sanctions would, unless sharply circumscribed, inhibit that discussion of public affairs which is the mainstay of our political system. The loss of public employment is equally likely to raise "the pall of fear and timidity [which] imposed upon those who would give voice to public criticism [creates] an atmosphere in which the First Amendment freedoms cannot survive." 376 U.S. at 278. An individual who must support himself and his family is, if anything, more vulnerable to a threat to his employment than a business is to a money judgment. Moreover, a teacher discharged for criticism of public officials can expect to find serious difficulty in obtaining new employment since prospective new employers may regard him as a potential troublemaker. Cf. *Greene* v. *McElroy,* 360 U.S. 474, 486-487.[15] Indeed, the court below has in-

[15] This was by no means only a theoretical possibility for the teachers in Seward. Superintendent Fabricius told one former teacher, Mr. Brown, that "school teachers that come out of this system and appl[y] to another school, there will be a little list on the administrator's desk, listing these teachers coming from Seward," referring to the teachers in the union. (R. 64). After Mr. Swick's contract was not renewed, Fabricius volunteered a

vited all the teachers in Alaska to engage in "self-censorship" by a pointed admonition in its first opinion.[16]

The argument is not enhanced by phrasing it in terms of the employee's contractual obligation to his employer, the government. "Self-censorship" by public employees deprives the public of the benefits of their views no less when it is based on a contractual obligation, than when it is based on the command of statute. The great freedoms of the First Amendment are not for the benefit of those who exercise them "so much as for the benefit of all of us," see *Time, Inc.* v. *Hill*, 385 U.S. 374, 389.

Moreover, even if the focus is entirely on the public employee himself, it can no longer be maintained that because he has no constitutional right to his job, he may be deprived of it because he has exercised a constitutional right. As the Supreme Court of California

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letter to the school board in another town where Swick had sought employment, advising them to investigate Swick's activities in other schools before employing him. Fabricius explained his reasons as follows:

"Mr. Walton: Now why did you do that?

Mr. Fabricius: Because I felt that if a teacher in a system was giving that system trouble then any other systems should make their investigation on it and not get in the same fix.

* * * * * * * * * * *

Mr. Walton: And do you do that by virtue of any regulations, sir, adopted by this School Board?

Mr. Fabricius: Oh, no." (App. pp. 346-347).

[16] "However, for the guidance of those in the teaching profession we suggest that it will be in the best interests of the school children, the teachers and the economy generally for teachers with grivances to follow an orderly procedure of seeking redress first at the superintendent level and then at the school board level." (App. p. 39).

recently said in sustaining the right of public employees to engage in political activity, "Despite the antiquity of this argument, its reasoning today stands utterly discredited." *Bagley* v. *Washington Township Hospital District,* 55 Cal. Rptr. 401, 405, 421 P. 2d 409, 413.[17] In *Keyishian* v. *Board of Regents,* 385 U.S. 589, this Court approved the Second Circuit's observation at an earlier stage of the case that "the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." 385 U.S. at 605-606, quoting 345 F. 2d 236, 239. See also *Cramp* v. *Board of Public Instruction,* 368 U.S. 278; *Wieman* v. *Updegraff,* 344 U.S. 183; *Torcaso* v. *Watkins,* 367 U.S. 488.[18]

If the right to criticize public officials and to associate for the purpose of ousting them peacefully were absolute, there would be no need for further argument. But this Court has declined to hold that these rights

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[17] The Court also said: "The public employee surely enjoys the status of a person protected by constitutional right. Public employment does not deprive him of constitutional protection. In the absence of an imperative necessity to protect the public from irresponsible activity of so serious a nature that it would disrupt the public welfare, such protections are not subject to destruction by a public employer's insistence that they be waived by contract." 55 *id.* at 407, 421 *id.* at 415.

[18] The "contract" analysis is without merit for a further reason. The power of a state, or a school board, to enter into contracts derives ultimately from the same source, and is subject to the same constitutional limitations, as other manifestations of its authority, cf. *Cooper* v. *Aaron,* 358 U.S. 1, 4; *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715, 725. Surely, the requirement that all teachers reveal all their associations, struck down in *Shelton* v. *Tucker,* 364 U.S. 479, would have fared no better if it had been embodied in the individual contracts between the teachers and the school boards in that state.

are totally protected from interference or regulation.[19] And so the Court must "appraise the substantiality of the reasons advanced in support of" the discharge of both petitioners for circulating the Open Letter and of Watts for assertedly asking other teachers to join a group seeking to oust the superintendent. See *Schneider* v. *State,* 308 U.S. 147, 161. The applicable criterion is that stated in *Bates* v. *Little Rock, supra:* "Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling." 361 U.S. at 524.

Since legislation narrowly drawn to prevent the supposed evil would weigh heavily in this Court, see *Cantwell* v. *Connecticut,* 310 U.S. 296, 307-308, it is appropriate first to consider the statutory basis of the judgment below. The tenure statute allows discharge of teachers for: a) "Incompetency," b) "Immorality" —defined as "conduct tending to bring the individual concerned or the teaching profession into public disgrace or disrespect" and c) "Substantial noncompliance with the school laws of the [State] [20] or regulations of the [State] Board of Education." (App. p. 51.) Since the Court below ruled that both activities which are involved here come within (b), it will be convenient to discuss that provision first. The Court construed that section as follows:

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[19] For example, even in *New York Times,* a majority of the Court held that a suit for civil damages would still lie if the defamed public official were able to establish that the criticism was a deliberate falsehood or that the defendant acted in reckless disregard of the truth. Cf. *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130.

[20] The statute was originally passed when Alaska was a Territory and its language as set forth in the Court's opinion reflects this.

> "Immorality," on the other hand, is broad and covers any and all conduct of the teacher which tends to bring disgrace or disrespect upon the teacher or the teaching profession. This definition would include all conduct from the commission of the most heinous felony down the scale of infamy to social misbehavior. The point in a teacher's conduct beyond which his behavior would tend to bring disgrace or disrespect upon him or his profession, would be one of degree depending upon the rules of society and to some extent upon the mores of the particular community. (App. pp. 51-52.)

While this construction casts grave doubt on the constitutionality of the statute itself, see point II, *infra*, it suffices for present purposes to observe that it is plainly not "narrowly drawn to define and punish specific conduct as constituting a clear and present danger of interest to the State." *Cantwell, supra,* 310 U.S. at 311. Nor do any of the grounds stated for bringing this case under the "immorality" statute present the compelling state interest which alone would justify the encroachment on petitioners' liberty of free association. See *Bates* v. *Little Rock, supra.*

The school board found that some of the statements in the Open Letter were "'false" and the court below accepted that finding and relied heavily on it. We disagree with that assessment; but even if it is permitted to stand, it cannot support the judgment below. The *New York Times* decision expressly disapproved of "truth" as a test for the constitutional protection of criticism of public officials. Such criticism loses its constitutionally protected character only if it was made "with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 279-280. The evidence conclusively demon-

strates that both petitioners earnestly believed the truth of the statements in the Open Letter and that they cannot be charged with recklessness in its publication.[21]

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[21] Petitioner Blue testified as follows on examination by counsel for the School Board:

"Mr. Burr: Is it your feeling and your position at this time Mr. Blue that each and every item of the ten items on Exhibit 7 are true in every respect.

Mr. Blue: To the extent that the people working on them conscientiously were able to state the truth, yes.

Mr. Burr: As president of, and a presiding member at the meeting that approved this document, exhibit 7, did you not have an opportunity to voice disapproval of these items if you had any question of their authenticity?

Mr. Blue: Yes sir, I did.

Mr. Burr: Did you make any objections to anyone of them?

Mr. Blue: No sir, I did not.

Mr. Burr: And by that do you mean that you subscribed to the accuracy of each and every item on this document?

Mr. Blue: Yes sir, within limits of ordinary human frailty, yes.

Mr. Burr: Are you stating by that or do you mean this board to understand by that that there is some question in your mind as to whether or not the ten items are wholly accurate?

Mr. Blue: There is no question in my mind about any of them.

Mr. Burr: Do you believe them to be true?

Mr. Blue: I do sir.

Mr. Burr: In every respect?

Mr. Blue: Yes sir, within the limits of human frailty." (App. p. 190).

Petitioner Watts testified as follows:

"Mr. Burr: Mr. Watts, you have indicated knowledge of Exhibit 7 which is the open letter to the Seward School Board which has items 1 through 10 were true in every respect at the time you distributed this letter to the public?

Mr. Watts: To the best of my knowledge, I believe every one of them were true at that time.

Mr. Burr: Had you thoroughly and exhaustively investigated yourself, or your group, to satisfy yourself beyond any reasonable doubt that each of these items were true?

Mr. Watts: I had investigated many of them and others I had complete confidence in the statements from many sources on the others." (App. p. 219).

The view of the court below that petitioners were subject to discharge because their publication of the Open Letter and Watts' conversation with the Framptons had a tendency to bring them into public disgrace and disrespect is likewise constitutionally impermissible. The *New York Times* case recognized that it is as much the citizen's "duty to criticize as it is the official's duty to administer." 376 U.S. at 282. And the Court quoted with approval (*id.* at 270) the "classic formulation" in the concurring opinion of Mr. Justice Brandeis in *Whitney* v. *California*, 274 U.S. 357, 375-376:

> "Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government."

In short, "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison* v. *Louisiana*, 379 U.S. 64, 74-75.[22]

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[22] To sustain Watts' discharge because his conversation with the Framptons may have led them to think less well of him, because they disagreed with him and rejected his invitation to join in the group effort to oust Superintendent Fabricious, would severely inhibit the right of free association. Even as a commentator on public subjects will often unwittingly speak falsely, so one who seeks to have others join him in a political association inevitably risks that some persons whom he solicits as members will disagree with his objectives and react with hostility to the invitation to join his group.

Moreover, to punish Watts because of the Framptons' reaction to his exercise of his political rights is akin to convicting a person who distributes leaflets because the persons who receive them throw them into the streets. Compare *Schneider* v. *State*, 308 U.S. 147.

Nor is it an adequate basis for the judgment below that the Open Letter casts the teaching profession into public disgrace or disrespect, if indeed it does. If this phrase is intended to refer to the teaching profession generally, it is but a thinly disguised version of the concept of "libel on government" which was squarely rejected in the *New York Times* case, 376 U.S. at 291-292. While all would agree that it is useful that the public think well of the teaching profession, it is equally true that the public should think well of the police force; but *New York Times* made clear that a general criticism of the police cannot constitutionally be forbidden. On the other hand, if "the teaching profession" refers to the Superintendent and the School Board who were criticized, the holding below directly contravenes the principle that concern for the reputation of public officials may not be exalted above "the paramount public interest in a free flow of information to the people concerning public officials, their servants." *Garrison* v. *Louisiana,* 379 U.S. at 77.

The Court below objected also that the Open Letter was "arbitrary" and "high-handed" (App. p. 66). But the ultimate function of the First Amendment is to withdraw from all branches of the government, including courts, the power to punish citizens for making proposals regarding the conduct of public office, even though these may be "high-handed," outrageous, destructive, or simply foolish. *Bond* v. *Floyd,* 385 U.S. 116, 132, 136. "For the Constitution protects expression and association without regard to * * * the truth, popularity, or social utility of the ideas and beliefs which are offered." *NAACP* v. *Button,* 371 U.S. 415, 444-445.

The alternate basis asserted for discharging petitioners is that they violated School Board regulation E-7 by circulating the Open Letter to the public without previously stating these criticisms first to the School Superintendent, and then to the School Board. There are several independent constitutional objections to this ruling, which are discussed in Part II, *infra*. But we shall treat here only with the question whether the governmental interest in petitioners' compliance with this regulation is sufficient to justify their discharge for exercising their First Amendment right to circulate the Open Letter.

We note at the outset that petitioners cannot be discharged for "disobedience" as such. In *Wright* v. *Georgia*, 373 U.S. 284, six young Negroes were convicted of breach of the peace for playing basketball. They had failed to heed the command of a police officer to stop playing, and the state argued that failure to obey the command of a police officer was a traditional breach of the peace. This Court unanimously rejected the argument: "Obviously, however, one cannot be punished for failing to obey the command of an officer if that command is itself violative of the Constitution." *Id.* at 291-292.

Police commands are surely entitled to respect at least as great as the directives of other agencies. The constitutional adequacy of this ground of discharge must therefore be judged in terms of the governmental interest embodied in the regulation itself, and the gravity of petitioners' breach. We submit that maintenance of a procedure for the processing of complaints against the School Board is truly inconsequential when compared with preservation of a free flow of information to the public regarding the administration of the school

system. The education of the young has been a dominant concern of civilized society from time immemorial. Under the scheme of Plato's *Republic*, control of education was delegated exclusively to the Guardians; but in a democracy it must ultimately be the responsibility of the people—as petitioners fully recognized. (App. pp. 222, 468-469, 485-487). It is utterly incompatible with a Constitution whereunder "the censorial power is in the people over the Government, and not in the Government over the people" [23] to permit public officials to shield their stewardship from criticism by imposing on their subordinates vows of silence to be observed on pain of discharge. For they then displace "the power of reason as applied through public discussion" with "silence coerced by law—the argument of force in its worst form," Brandeis, J., concurring in *Whitney* v. *California*, 274 U.S. 357, 376, quoted in *New York Times, supra*, 376 U.S. at 270. That is this case.

Respondents have argued [24] that the discharge of petitioners for their political activities is constitutional because they had "undermined the morale and discipline of the public school system." We readily acknowledge that the morale and discipline of the public service are among those interests which may require an accommodation between legislative power and individual exercise of First Amendment rights, see *United States* v. *Robel*, 389 U.S. 258, 268, n. 20. But surely, "morale and discipline" can no more "be invoked as a talismanic incantation to support any exercise" of

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[23] 4 Annals of Congress 934 (1794) quoted at 376 U.S. 275.

[24] Brief in Opposition to Petition for a Writ of Certiorari, No. 325, Oct. Term, 1967 (hereafter "Brief in Opp."), p. 5.

governmental power than "war power," *id.* at 263, "privilege," or "breach of contract." [25]

It is not necessary to speculate under what circumstances political liberties may properly be required to yield to the demands of "morale and discipline," for respondents have not shown that petitioners' conduct constituted "a substantive evil actually designed to impede" the performance of the School Board's functions. The quoted language is from *Wood* v. *Georgia*, 370 U.S. 375, 389, one of a series of cases in which an exercise of judicial contempt power to punish conduct which impedes the administration of justice was claimed to infringe First Amendment rights. In holding that public statements by a county sheriff to the press on a matter before the grand jury could not, under the circumstances of the case, constitutionally be punished, the Court said:

> Men are entitled to speak as they please on matters vital to them; errors in judgment or unsubstantiated opinions may be exposed, of course, but not through punishment for contempt for the expression. Under our system of government, counter-argument and education are the weapons available to expose these matters, not abridgement of the rights of free speech and assembly. Cf. Mr. Justice Brandeis, concurring in *Whitney* v. *California*, 274 U.S. 357, 378. Hence, in the absence of some other showing of a substantive evil actually designed to impede the course of justice in justification of the exercise of the contempt power to si-

[25] To allow a discharge in the name of "morale and discipline" without further inquiry into the impact on constitutionally protected rights would simply restore, under a new rubric, the discredited doctrine that the Constitution does not protect a public employee in his job.

lence the petitioner, his utterances are entitled to be protected. 370 U.S. at 389.[26]

The analogy between *Wood* and its antecedents, which involve the administration of justice, and cases like the present, wherein the claim is asserted that the rights of free speech and association may be curtailed in the interest of administration of the public service, is sound in logic and principle. "The right of courts to conduct their business in an untrammeled way," *id.* at 383, is at least as great as that of school boards. And even as "the administration of the law is not the problem of the judge or prosecuting attorney alone, but necessitates the cooperation of an enlightened public," *id.* at 391, so the administration of the public schools is not the exclusive domain of school boards, superintendents or teachers. In short, "morale and discipline" and other elements of administrative efficiency are subject to the same rigorous tests as the contempt power when they impinge upon rights protected by the First Amendment.

Another lesson of immediate relevance can be drawn from *Wood* v. *Georgia*. The Court was not content to rely on the conclusion of the Georgia courts that Wood's "conduct created a serious evil to the admin-

[26] The Court reviewed prior decisions dealing with this subject since *Bridges* v. *California*, 314 U.S. 252. That case adopted a "clear and present danger" standard, which was a "working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." See 370 U.S. at 384. The *Wood* opinion also approved the language of *Craig* v. *Harney*, 331 U.S. 367: "The vehemence of the language used is not alone the measure of the power to punish for contempt. The fires which it kindles must constitute an imminent, not merely a likely threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil."

istration of justice." 370 U.S. at 386. Consistent with its "ultimate responsibility to define limits of state power regarding freedom of speech and expression," (*id.*), the Court carefully examined the record, and concluding that it failed to illustrate "the serious degree of harm to the administration of law necessary to justify exercise of the contempt power," (*id.* at 393), reversed the conviction. A like result is required here. While respondents argue that "Petitioners' discharge was sustained because of the specific finding that their activities threatened to impair the efficiency and integrity of the school system" (Brief in Opp. p. 5), the record does not substantiate their claim. The holding that petitioners were subject to discharge for violating regulation E-7 by circulating the Open Letter rested simply on the Court's construction of that regulation and its approval of the finding that it had not been obeyed. It nowhere suggests that this breach interfered with the operations of the school system—such an inquiry would have been irrelevant under the Court's approach that petitioners were subject to discharge because they had breached their agreement to abide by the regulations. Nor did the court make a specific finding of the sort claimed by respondents when it concluded that petitioners were guilty of immoral conduct by circulating the Open Letter or (as to Watts) when he spoke to the Framptons. We have set forth in the margin the Court's statements of its conclusions on these issues.[27] In both instances the critical determina-

[27] With respect to the Open Letter, the Court said: "The overall, abiding effect of the widespread circulation of the false statements and the high-handed method employed to seek redress in disregard of established procedures, could only result in a loss of respect by the public for appellants and the teaching profession in general when all of the facts became known and was immoral conduct

tion regarding the effect on the public's image of petitioners and the teaching profession is couched in the speculative form "could only." Moreover, the events which were supposed to trigger this public reaction —"when all of the facts became known" (App. pp. 66, 69)—were neither found, nor shown to have occurred.

A state may not penalize the exercise of First Amendment rights by resort to such speculations regarding possible interference with other state interests, no matter how legitimate. This is illustrated not only by *Wood* v. *Georgia,* but by the series of cases which have upheld the First Amendment right of individuals to associate for the purpose of assisting each other in the assertion of their legal rights, despite the contention that the methods which they had chosen would interfere with the administration of justice and lessen respect for it. *NAACP* v. *Button,* 371 U.S. 415; *Trainmen* v. *Virginia,* 377 U.S. 1; *Mine Workers* v. *Illinois State Bar,* 389 U.S. 217, particularly at 222-225.

The reasons asserted in support of petitioners' discharge are markedly less substantial than those which led a divided Court to sustain the constitutionality of Section 9(a) of the Hatch Act in *United Public Workers* v. *Mitchell,* 330 U.S. 75, relied on by respondents (Brief in Opp. p. 5). The political activities there proscribed were thought to "menace the integrity and the competency of the [public] service," *id.* at 103. More-

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within the meaning of that term as it was then defined by statute." (App. p. 66).

With respect to Watts' conversation with the Framptons, the Court said: "Appellant Watts' efforts, made during school hours on school premises, were degrading, unprofessional and detrimental to morale and discipline and could only result in loss of respect by the public for him and his profession when all of the facts became known." (App. p. 69).

over, the Court in *Mitchell* was careful to point out the limited scope of the Hatch Act provision:

> It is only partisan political activity that is interdicted. It is active participation in political management and political campaigns. Expressions, public or private, on public affairs, personalities and matters of public interest, not an objective of party action, are unrestricted by law so long as the government employee does not direct his activities toward party success. *Id.* at 100.

In the *Mitchell* case, the Court relied heavily on the legislative judgment regarding the efficiency of the public service and the fact that Congress acted in light of prior experience under a very similar regulation of the Civil Service Commission. Moreover, the legislative history demonstrated that both the Congress and President Roosevelt, who signed the bill into law, acted with conscious regard to the right of civil servants to engage in political activities. This is in sharp contrast to the immorality statute and regulation E-7, which, as we have already shown, are general enactments which were not designed specifically—if at all—to affect teachers' rights to engage in political activities. In short, unlike the Hatch Act, the judgment below does not come to this Court "encased in the armor wrought by prior legislative deliberation," *Bridges* v. *California,* 314 U.S. 252, 261; *Wood* v. *Georgia,* 370 U.S. 375, 385.[28] Consequently, there is no need to con-

[28] On the contrary, the Alaska legislature has expressly disapproved the construction of the "immorality" provision in this case: subsequent to the first decision of the Supreme Court of Alaska in this case, the legislature in 1965 enacted AS 14.20.095 providing that no rule or regulation of certain education officials may restrict or modify a teacher's right to comment and criticize public education officials, outside of school hours, to the same extent that a private individual might do so. Further, the tenure

sider herein whether *Mitchell* should be followed in a case in which its holding is relevant to the result.

II. THE STATUTE AND REGULATION ON WHICH PETITIONERS' DISCHARGE WAS BASED ARE UNCONSTITUTIONALLY VAGUE AND OVERBROAD.

The foregoing demonstrates, we submit, that petitioners' discharge violated the First Amendment, even if the "immorality" provision and regulation E-7 are not unconstitutional on their face. But as we show now, the judgment below must be reversed on the additional ground that the statute and the regulation both suffer from the related constitutional infirmities of vagueness and overbreadth. We turn first to the immorality provision of the tenure statute.

As we have seen, the Court below held that the phrase "immorality" in the list of causes for which a teacher may be "nonretained" was expressly designed as a "catch-all." This Court once said, in another context, "A catchall the phrase surely is; but this is not to define what it catches." *Flora* v. *United States*, 362 U.S. 145, 149. But the Court below has construed "immorality" to catch "all conduct from the commission of the most heinous felony down the scale of infamy to social misbehavior." (App. p. 52). That construction of the statute is authoritative and binding here, even if a narrower interpretation would have protected it from constitutional challenge. *Wieman* v. *Updegraff*, 344 U.S. 183, 190; *Kingsley Pictures Corp.* v. *Regents*, 360 U.S. 684, 688; *Cramp* v. *Board of Public Instruction*,

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statute was amended, effective July 14, 1966, and "immorality" was defined as the commission of a crime involving moral turpitude. As the court below points out, ". . . as a result of this amendment there is no longer a statutory cause for nonretention of a teacher for general misconduct not amounting to a crime involving moral turpitude." (App. p. 76, n. 31).

368 U.S. 278, 285; *NAACP* v. *Button*, 371 U.S. 415, 431-432. And under that construction the statute is hopelessly vague and uncertain and denies the affected teachers due process of law. This would be true even if the statute did not touch upon First Amendment rights. "Social misbehavior" is plainly a concept so inherently vague "that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally* v. *General Construction Co.*, 269 U.S. 385, 391.

Respondents point out (Brief in Opp. p. 7), that many states have teachers' tenure statutes which are broad in language and that this is necessary because no statute can spell out all possible forms of conduct which would be just cause for the discharge of a teacher. But this problem is not confined to tenure laws, but affects the drafting of legislation generally. To tolerate all forms of indefinite commands because greater precision is difficult, would entail scrapping the void-for-vagueness doctrine. Moreover, no other state seems to have found it necessary to adopt the sweeping formulation adopted below, which includes "all conduct from the commission of the most heinous felony down the scale of infamy to social misbehavior." (App. p. 52) Nor do any of the decisions cited below similarly exact "obedience to a rule or standard * * * so vague and indefinite as to really be no rule or standard at all," *Small Co.* v. *Amer. Sgr. Refining Co.*, 267 U.S. 233, 239.[29]

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[29] *Beilan* v. *Board of Education*, 357 U.S. 399, relied on by respondents, does not shield the immorality statute from constitutional attack. No issue of vagueness was raised by petitioner in this Court. Moreover, neither in *Beilan* nor in its other decisions cited by the Court below, has the Pennsylvania Supreme Court given to its statute the same sweeping interpretation as the Alaska Supreme Court adopted in this case.

It is, moreover, of the utmost relevance that the immorality provision has been construed by the court below to "catch" the exercise of First Amendment rights. This means that it must be assessed by the "stricter standards of permissible statutory vagueness" applicable to a statute having a potentially inhibiting effect on speech, press and association. *Smith* v. *California,* 361 U.S. 147, 151. For it is clear from this case that, as construed by the Court below it touches upon "the area of free expression." *NAACP* v. *Button,* 371 U.S. 415, 432. What was recently said in *Keyishian* v. *Board of Regents,* 385 U.S. 589, 603-604, is therefore directly in point and controlling:

> We emphasize once again that "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms," *N.A.A.C.P.* v. *Button,* 371 U.S. 415, 438; "[f]or standards of permissible statutory vagueness are strict in the area of free expression. . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *Id.,* at 432-433. New York's complicated and intricate scheme plainly violates that standard. When one must guess what conduct or utterance may lose him his position, one necessarily will "steer far wider of the unlawful zone. . . ." *Speiser* v. *Randall,* 357 U.S. 513, 526. For "[t]he threat of sanctions may deter . . . almost as potently as the actual application of sanctions." *N.A.A.C.P.* v. *Button, supra,* at 433. The danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform teachers what is being proscribed.

The immorality provision is unconstitutional also because of overbreadth. In *Shelton* v. *Tucker,* 364 U.S. 479, 488, this Court said:

> In a series of decisions, this Court has held that, even though the governmental purpose be legiti-

> mate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose."

This principle has been repeatedly applied to strike down statutes which too broadly interfere with the exercise of First Amendment rights. See, e.g., *NAACP* v. *Alabama,* 377 U.S. 288; *Baggett* v. *Bullitt,* 377 U.S. 360; *Elfbrandt* v. *Russell,* 384 U.S. 11; *Keyishian* v. *Board of Regents,* 385 U.S. 589; *Whitehill* v. *Elkins,* 389 U.S. 54; *United States* v. *Robel,* 389 U.S. 258. It has remained unquestioned despite disagreements within the Court as to whether the particular statute under consideration should be deemed overbroad. But there can be no doubt as to the "immorality" provision, because it has been authoritatively construed in this very case to extend its prohibitions to the exercise of First Amendment rights. For the Court below held that the "immorality" provision extends to Blue's speech to the International Longshoremen & Warehousemen's Union "in an attempt to gain popular support for a recall vote involving the Seward Public School Board members." (App. 70-71.) Yet, as the Court necessarily acknowledged, that speech was constitutionally protected. (App. pp. 86-87.) We cannot readily imagine a more clearly privileged occasion for criticism of public officials than a speech in connection with an election to recall them from their office.

> "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our con-

stitutional system." *Stromberg* v. *California,* 283 U.S. 359, 369.

Thus, as authoritatively construed by the highest court of Alaska, the immorality statute authorizes the discharge of teachers for engaging in conduct protected by the First Amendment. As so construed, it may not stand.

A like conclusion must be drawn with respect to regulation E-7. There can be no doubt that it, too, is unconstitutionally vague, as construed below. On its face, the regulation is perfectly reasonable; it merely prescribes an orderly procedure for the processing of teacher grievances, a familiar technique in employer-employee relations. Compare *Republic Steel Corp.* v. *Maddox,* 379 U.S. 650. There is no hint in this language that it affects the right of teachers to communicate with the public concerning the affairs of the school system or even of criticizing the school superintendent or school board. We submit that the construction of that regulation by the school board, which was approved by the court below, is such a grotesque transformation of its innocuous language that it failed to give adequate warning that petitioners' conduct would contravene it. The imposition of sanctions against them would therefore violate due process even in the absence of First Amendment considerations. *Bouie* v. *City of Columbia,* 378 U.S. 347, 354; *Small Co.* v. *Amer. Sgr. Refining Co.,* 267 U.S. 233, 239.[30]

[30] There is an additional reason why regulation E-7 must be held void for vagueness. When a teacher reads this regulation in conjunction with regulation E-9, he is left hopelessly at sea, because they appear to give inconsistent instructions. Even Superintendent Fabricius, who testified that he had written them, when asked about their meaning, found it all but impossible to reconcile them. (App. pp. 328-340). See the discussion in the opinion of Justice Rabinowitz dissenting on this issue below, (App. pp. 102-105). Compare *United States* v. *Cardiff,* 344 U.S. 174.

But, of course, since the regulation has been interpreted to extend to political activity, it must be judged by the stricter standards of specificity of the First Amendment cases already discussed.

Regulation E-7 is also unconstitutional for overbreadth. Its command that procedures within the school system be exhausted is absolute. No matter how genuine the teacher's "grievance" may be, or how immediately it affects the interests of the school system, he may not bring it to public attention until he has communicated with the superintendent and the school board. A rule which undiscriminatingly cuts off the public from a vital source of *all* information adverse to the administrators of its school system until they themselves in effect release the information by "processing the grievances" is the very autithesis of the "precise" regulation which alone can survive Constitutional challenge in the First Amendment area. Cf. *Shelton* v. *Tucker,* 364 U.S. 479, 487-490. And regulation E-7 is doubly pernicious. For the delays which it exacts apply only to "grievances." Comments favorable to the administrators are not similarly inhibited. This is the very antithesis of the "uninhibited, robust and wide-open" debate on public issues which the First Amendment secures. *New York Times* v. *Sullivan,* 376 U.S. at 282.[11]

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[11] This parallels the imbalance which existed because of the immunity of public officials from libel suits. (*Barr* v. *Matteo,* 360 U.S. 564) prior to the *New York Times* decision. "It would give public servants an unjustified preference over the public they serve, if critics of official conduct did not have a fair equivalent of the immunity granted to the officials themselves." 376 U.S. at 282.

CONCLUSION

By reason of the foregoing, the judgment of the Supreme Court of Alaska should be reversed.

Respectfully submitted,

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